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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 221

HARRY C. RITTER and CHRIS S. KNAUR,
Petitioners,

v.

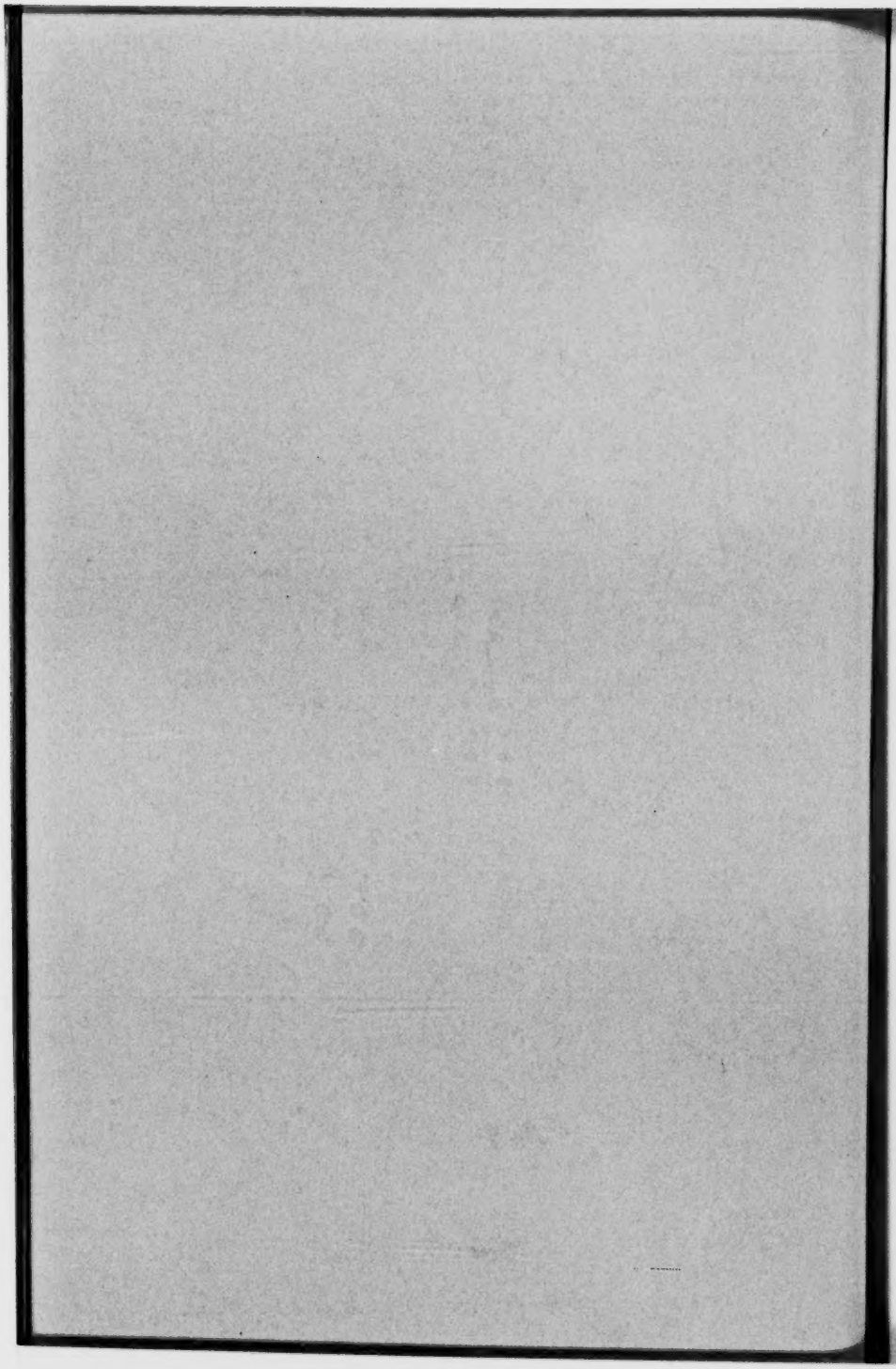
WYOGA GAS AND OIL CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

SAMUEL S. JENNINGS, JR.,
Counsel for Wyoga Gas & Oil Corporation, Respondent.

GRESSER & WALKER,
RICHARD HENRY KLEIN,
CARL RICE,
RUSSELL S. MACHMER,
Of Counsel.

THE COURT PRESS, N. Y. C.



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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Counter Statement of Question Involved.

Is an order of the District Court refusing a motion to dismiss a complaint upon the ground that the said Court was without jurisdiction to entertain the suit, a final judgment from which an appeal could be taken to the Circuit Court of Appeals?

Counter Statement of the Case.

Wyoga Gas & Oil Corporation, plaintiff in the Court below, filed a complaint in the District Court of the United States for the Middle District of Pennsylvania on December 2, 1938, wherein a number of former directors and officers of the corporation were named as defendants.

The complaint contained nine separate and distinct causes of action, eight of which related to specific transactions and the ninth of which was a general cause of action for an accounting from the defendants. All but two of the defendants, namely Geddes H. Schrack and Bernard Frank, were residents and citizens within the territorial limits of the District Court of the United States for the Middle District of Pennsylvania. Geddes H. Schrack at the time the complaint was filed was a resident and citizen of the State of Ohio, residing in Mansfield, Ohio, and Bernard Frank was a resident and citizen of the State of New York, residing at Long Beach, New York.

The plaintiff is a corporation, organized and existing under the laws of the State of Delaware. The sole basis of Federal Jurisdiction is diversity of citizenship. The various causes of action set forth in the complaint relate to the making of secret profits by the defendants, negligence in acquiring worthless property for the plaintiff corporation and other acts of mismanagement, fraud and negligence in the conduct of their affairs of the corporation.

Two of the defendants, Harry C. Ritter and Chris S. Knaur, the present petitioners, on December 16, 1938 filed a motion to dismiss the complaint upon the ground that all the defendants were not residents within the territorial limits of the District Court of the United States for the Middle District of Pennsylvania, contending that where the sole ground of federal jurisdiction is diversity of citizenship, all of the defendants must be residents in the district in which suit was brought against them. It was also contended, although not specifically set forth in the defendants' motion, that two of the defendants, Geddes H. Schrack and Bernard Frank, are indispensable parties to the action and that by reason of their residence in states other than Pennsylvania, jurisdiction of the Federal District Court was thereby precluded.

On April 3, 1939 the Honorable Albert W. Johnson of the District Court filed an opinion finding that the defendants' contentions were without merit and entered an order refusing the motion to dismiss the complaint and granting the defendants leave to file an answer to the complaint within twenty days. Defendants thereafter, on April 10, 1939, presented a petition for a reargument of the case, which petition was granted. Reargument was had on April 28, 1939. On October 7, 1939, Honorable Albert W. Johnson of the Federal District Court, entered an order again refusing the motion to dismiss the complaint.

From this order an appeal was taken by the defendants, Harry C. Ritter and Chris S. Knaur, to the Circuit Court of Appeals for the Third Circuit. On March 4, 1940 the Circuit Court of Appeals for the Third Circuit dismissed the appeal for the reason that the order appealed from was an interlocutory order. A petition for re-hearing was filed which was denied by that Court on April 12, 1940.

Argument.

The sole question presented by the petition of the defendants, Harry C. Ritter and Chris S. Knaur, for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit is whether the order of the District Court of the Middle District of Pennsylvania refusing to dismiss the complaint upon the ground that said Court had no jurisdiction because two of the defendants were non-residents of Pennsylvania, is a final order from which an appeal could be taken to the Circuit Court of Appeals. The Circuit Court of Appeals held the order was interlocutory and therefore not appealable (R. 68-69).

Under Section 128 of the Judicial Code, as amended, Title 28 Sec. 225a (Pocket Parts) U. S. C. A., a Circuit

Court of Appeals has jurisdiction to review by appeal final decisions in the District Court. Under the circumstances presented by this case the Circuit Court of Appeals had no authority to review the decision of the District Court which is interlocutory and not final.

A final judgment or decree from which an appeal may be taken must terminate the litigation between the parties on the merits of the case so that if there should be an affirmance on appeal the Court below would have nothing to do but to execute the judgment or decree it had already rendered. The judgment is not final unless it disposes of the whole case on its merits. *Bostwick* v. *Brinkerhoff*, 106 U. S. 3, 1 S. Ct. 15, 27 L. Ed. 73.

The decree of the District Court was essentially one refusing to dismiss the complaint because of the alleged lack of jurisdiction of that Court to entertain this action. It obviously was not a final decree.

The right to review rulings on the question of jurisdiction, as a general rule, may not be availed of until after final judgment. An order or judgment overruling a plea to the jurisdiction is not a final judgment from which an appeal lies.

> 2 American Jurisprudence, p. 892, par. 70;
> *Toledo R. & Light Co.* v. *Hill*, 244 U. S. 49, 61 L. Ed. 982, 37 S. Ct. 591;
> *McLish* v. *Roff*, 141 U. S. 661, 35 L. Ed. 893, 12 S. Ct. 118.

An order denying a motion for a dismissal of the action, is, as a general rule, not appealable, since such an order lacks finality, 2 American Jurisprudence, p. 897, par. 80.

In the case of *Grand Trunk Western R. Co.* v. *McHie*, 100 F. 2d. 86 (C. C. A. Sixth Circuit, Nov. 14, 1938) cited by the Circuit Court of Appeals for the Third Circuit, dismissing the appeal in this case, it is clearly held that

the Circuit Court of Appeals has no jurisdiction to entertain an appeal from an order denying a motion to dismiss.

To the same effect are:

Mann v. *Gaddie*, 158 F. 42 (C. C. A. Fifth Circuit);

Rodriguez v. *Arosemena et al.*, 91 F. 2d. 219 (C. C. A. Fifth Circuit, 1937).

Moreover the decision of the Circuit Court of Appeals in this case is not a final decision and therefore no appeal lies to this Court, *Slaker* v. *O'Connor*, 49 S. Ct. 158, 278 U. S. 180, 73 L. Ed. 258.

The decree of the Circuit Court of Appeals for the Third Circuit in this case was correctly entered, and it is respectfully submitted that the petition for a Writ of Certiorari be denied.

SAMUEL S. JENNINGS, JR.,
Counsel for Wyoga Gas & Oil Corporation, Respondent.

GRESSER & WALKER,
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CARL RICE,
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Of Counsel.